Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

C.P. and G.P.,

Petitioners,

v.

J.D.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does this Court's ruling in *Michael H. And Victoria D. v. Gerald D.*, 491 U.S. 110, 109 S. Ct. 2333 (1989), that an adulterous natural father has no parental rights against the unitary family, bind Montana's courts?

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The Petitioners' Petition for a Writ of Certiorari to review the judgment of the Montana Supreme Court in this case.

OPINIONS BELOW

The November 23, 2005 Opinion of the Montana Supreme Court, Case No. 05-183, reported at 2004 MT 297, is attached at Appendix A, page 1a. The Petitioners' Petition For Rehearing, denied on December 20, 2005, is attached at Appendix D, page 29a. The District Court's unreported Findings Of Fact, Conclusions Of Law and Judgment in Cause No. DF-02-003 were filed December 24, 2003, and are attached at Appendix C, page 20a. The District Court's unreported February 23, 2004 Order and Rationale denying the Petitioners' Motion For A New Trial and Request For Stay Of Judgment, filed January 22, 2004, are attached at Appendix B, page 16a.

The Petitioners had alleged their Fourteenth Amendment rights had been violated in the Court's application of Montana's Uniform Parenting Act, Title 40, Ch. 6, Part 1, Mont. Code Ann., but the District Court failed to address this issue in its Order denying their motion and request for stay.[1]

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1. The Petitioners retained new counsel and filed a Petition To Terminate Parental Rights, Petition For Adoption, Request For Stay, And Complaint For Birth Costs And Delinquent Child Support, and Motion And Request For Stay Of Visitation And Brief In Support (Stay denied August 20, 2004). J.D. petitioned the District Court June 10, 2004, to join J.D.'s Petition For Determination Of Paternity, Cause No. DF-02-003(C), for which a final judgment had issued, with the Petitioners' Petitions, Cause No. DA-04-015C, for which no hearing was ever held or scheduled. The lower court granted J.D.'s request for consolidation in its Order dated July 13, 2004.

STATEMENT OF JURISDICTION

The Montana Supreme Court's ruling has violated the Petitioners' fundamental constitutional rights, including, without limitation, equal protection, the rights of association and the right to parent, and thereby raises a federal question. These rights were delineated when this Court granted *certiorari*, and issued its opinion in *Michael H. and Victoria D. v. Gerald D.*, 491 U.S. 110, 109 S. Ct. 2333 (1989), and are thus applicable here.

The Petitioners are the very family about which this Court was concerned in *Michael H.*, but the Montana Supreme Court has denied them equal protection under the law, and abridged their fundamental right to parent. This Court's holding in *Michael H.* was cited extensively to, and ignored by, both the Montana Eleventh Judicial District Court and the Montana Supreme Court. The jurisdiction of this Court is thereby invoked under 28 U.S.C. § 1257.

NOTIFICATION OF STATE ATTORNEY GENERAL

Because the Montana Supreme Court and the district court failed to address this Court's unequivocal holding in *Michael H.*, despite extensive, detailed application of this Court's authority by the Petitioners, the constitutionality of Title 40, Ch. 6, Part 1, Mont. Code Ann., must now be raised. Furthermore, the Montana Eleventh Judicial District Court failed to address the abridgement of the Petitioners' federal Fourteenth Amendment rights, as asserted in their *pro se* Motion For A New Trial.[2] Therefore, 28 U.S.C. § 2403(b)

2. Due to J.D.'s failure to file a Notice of Entry of Judgment following the state district court's December 24, 2003 Order on (Cont'd)

may apply, requiring service on the Montana Attorney General.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 40, Ch. 6, Part 1, Mont. Code Ann.

Mont. Code Ann. § 40-6-105

Mont. Code Ann. § 40-6-107:

> Determination of father and child relationship—who may bring action. (1) Any interested party may bring an action for the purpose of determining the existence or nonexistence of the father and child relationship presumed pursuant to 40-6-105.
>
> (2) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under 40-6-105 may be brought by the child, the mother or personal representative of the child, the department of public health and human services or its appropriate legal affiliate, the personal representative or a parent of the mother if the mother has died, a person alleged or alleging to be the father, or their personal representative or a

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(Cont'd)

J.D.'s, the Petitioners were able to appeal at a much later date following the Order. No such Notice of Entry of Judgment is required following disposition of motions for new trial under M.R.App.P. 5(a)(4), which effectively barred appeal of that Order.

parent of the alleged father if the alleged father has died or is a minor.

(3) Regardless of its terms, an agreement, other than an agreement approved by the court in accordance with 40-6-114(2), between an alleged or presumed father and the mother or child does not bar an action under this section.

(4) If an action under this section is brought before the birth of the child, all proceedings must be stayed until after the birth, except service of process and the taking of depositions to perpetuate testimony.

U.S. Const. amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners G.P. and C.P. (the "Petitioners"), have been continuously married for 18 years, but separated briefly in 2001, when C.P. became pregnant by J.D. The Petitioners have three sons, and 3-year-old daughter K.P., at issue here.

J.D., the adulterous natural father of K.P., moved from Chicago to Montana in 2001 to pursue C.P, leaving behind his then-six-year-old son A.D. After moving to Montana, J.D. gave up custodial rights to his son.

C.P. became pregnant by J.D. during the separation from G.P. C.P. and G.P. then reconciled in C.P.'s 2nd month of pregnancy. G.P. was fully aware of these circumstances.

G.P. participated in C.P.'s birthing of K.P, listed himself as K.P.'s father on her birth certificate, and gave K.P. his family's name. Neither C.P. nor K.P. ever cohabited with J.D. J.D. has never paid toward K.P.'s birthing costs, and for an extended period did not pay child support, though both failures are statutorily against K.P.'s best interests. J.D. is paying inadequate child support, which is pending further adjudication in the Montana District Court. The lower courts have forced upon K.P. a relationship with J.D., a complete stranger to the young girl.

Just prior to K.P.'s birth, J.D. on May 17, 2002 executed an Order in Illinois granting sole custody of his son to his now-ex-wife, whom he divorced in 1999. Then, while C.P. was laboring in her 8th month of pregnancy, J.D. on July 19, 2002, petitioned the Montana District Court under the Uniform Parenting Act, as adopted in Montana, for recognition of his parental rights, inexplicably citing *Michael H. and Victoria D. v. Gerald D.*, 491 U.S. 110, 109 S. Ct. 2333, 105 L. Ed. 2d 91 (1989) as supporting authority in his July 19, 2002 Petition For Determination Of Paternity, Adoption Of Parenting Plan And Child Support. J.D. asserted that this Court decided that an individual outside of the marital relationship could not assert his paternity, but state legislatures could allow rebuttal of fatherhood. *Michael H.*

was then cited by the Petitioners in their October 3, 2003 Post-Hearing Memorandum to the district court for the proposition that a mere biological connection is insufficient to establish a constitutionally protected liberty interest on the part of an unwed father. Despite being presented with the authority in *Michael H.* by both sides, the district court never considered that authority, even though it post-dated *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983), cited approvingly by the Montana Supreme Court in 1995 in *Paternity of Adam*, 273 Mont. 351, 903 P.2d 207 (1995). Neither the district court nor the Montana Supreme Court ever discussed, applied or distinguished this Court's holding in *Michael H.*, though this authority was cited extensively to them both at every stage of the proceedings.

Consistent with the Petitioners' fundamental rights as parents, C.P. opposed J.D.'s efforts, but did not directly assert the Petitioners' fundamental parental or other constitutional rights. G.P. was forced to undergo DNA testing, though he had undergone a vasectomy several years prior and was not at the time even a party to the proceedings. Experts and a guardian *ad litem* came to opposite conclusions as to whether allowing J.D. to parent K.P. was in K.P.'s best interests. The Petitioners' counsel withdrew, and new counsel on October 2, 2003, filed a Post-Hearing Memorandum to rebut the testimony of the guardian *ad litem* appointed by the lower court. As authority, C.P. correctly cited this Court's holding in *Michael H.*

Without addressing this Court's holding in *Michael H.*, on December 24, 2003, the lower court ruled against C.P. and awarded J.D. parental rights, creating two legal fathers and one mother. Of greatest concern, the court thereby bastardized K.P. by forcing a relationship upon her with a